2017-1312

United States Court of Appeals for the Federal Circuit

GLYCINE & MORE, INC.,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant

GEO SPECIALTY CHEMICALS, INC.,

Defendant-Appellant.

Appeal from the United States Court of International Trade in Case No. 1:13-CV-00167-TCS, Timothy C. Stanceu, Chief Judge

BRIEF OF APPELLANT GEO SPECIALTY CHEMICALS, INC.

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CERTIFICATE OF INTEREST

Counsel for Appellant in this action, certifies the following:

1. The full name of every party or amicus represented by me is:

GEO Specialty Chemicals, Inc.

2. The name of the real party in interest (if the party named in the caption is not the real party in interested) represented by me is:

None.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or are expected to appear in this court are:

None.

Dated: February 6, 2017

/s/ David M. Schwartz

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STATEMENT OF RELATED CASES

Counsel for Appellant, GEO Specialty Chemicals, Inc. ("GEO"), is unaware of any other appeal in or from this action that was previously before this Court or any other appellate court. Nor is counsel aware of any pending cases in this Court or in any other court that will directly affect, or be directly affected by, the Court's decision in this appeal.

JURISDICTIONAL STATEMENT

The U.S. Court of International Trade ("CIT") had jurisdiction for the issues presented by GEO under 19 U.S.C. § 1516a(A)(2)(A)(i)(1).

The CIT issued its final judgment on October 11, 2016. Appx1. GEO timely appealed on December 6, 2016. Appx672.

This Court has exclusive jurisdiction over appeals from final judgments of the CIT, and for the issues presented by GEO, under 28 U.S.C. § 1295(a)(5).

STATEMENT OF THE ISSUES

The issues presented in this appeal are as follows:

1. Did the CIT usurp the role of an agency to reasonably interpret or clarify the agency's own regulations?

2. Does a court err when it directs an agency to produce a result upon remand but does not require that agency to further explain or clarify its interpretation of its regulations?

STATEMENT OF THE CASE

This case arises from a final determination and a court-ordered remand redetermination issued by the International Trade Administration of the U.S. Department of Commerce ("Commerce"). The lower court's judicial review involved the final determination issued by Commerce in *Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 78 Fed. Reg. 20,891 (Int'l Trade Admin. Apr. 8, 2013) ("Final Results"). *See* Appx641. After a court-ordered remand, the lower court's judicial review also involved Commerce's redetermination on remand, *Final Results of Redetermination Pursuant to Court Remand* (Int'l Trade Admin. Feb 2, 2016) ("Remand Redetermination"). *See* Appx628.

Plaintiff in the underlying action, Glycine & More, Inc. ("G&M"), is an affiliate of Baoding Mantong Fine Chemistry Co., Ltd. ("Baoding Mantong"), a Chinese producer and exporter of glycine and the sole respondent in the review.

GEO and Baoding Mantong originally requested an administrative review under 19 U.S.C. § 1675(a)(1) and 19 C.F.R. § 351.213(b). On July 9, 2012, Commerce selected Baoding Mantong as a mandatory respondent and issued a questionnaire. The sole issue in this case involves the process by which the request for an administrative review is withdrawn. On that point, 19 C.F.R. § 351.213(d)(1) states:

> The Secretary will rescind an administrative review under this section, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. The Secretary may extend this time limit if the Secretary decides that it is reasonable to do so.

Despite months of announcements by Commerce that it would only consider a request to withdraw an administrative review request submitted to Commerce after 90 days from the date of publication of the notice of initiation if an "extraordinary circumstance" existed and despite 19 C.F.R. § 351.302 permitting Baoding Mantong to seek a deadline extension of the right to withdraw its administrative review request if it filed the deadline extension request before the 90-day period expired, Baoding Mantong failed to provide an "extraordinary circumstance" for its withdrawal request after the 90-day deadline and failed to seek a deadline extension of the right to withdraw its administrative review request before the 90-day period expired. While GEO timely submitted a request to withdraw its review request, Baoding Mantong missed the 90-day deadline.

When instructed by Commerce to continue in the review, Baoding Mantong chose not to participate at all and was eventually assessed a 453.79% antidumping margin for its refusal to respond to Commerce's questionnaire, an essential part of the review process. Instead, Baoding Mantong's U.S. affiliate, G&M, entered an appearance after the preliminary results in the review and filed a summons and complaint with the CIT challenging Commerce's Final Results.

The CIT in its deliberations discounted objections from both GEO and Commerce and determined that Commerce's discretion to decide what was "reasonable" was, in fact, limited by *Federal Register* language explaining a prior, related regulation; this determination was made despite conflicting *Federal Register* language in the promulgation of the specific regulation at issue, 19 C.F.R. § 351.213(d)(1). The CIT ordered Commerce to extend the deadline to request an administrative review withdrawal unless "new and compelling" evidence existed in the record to not do so, effectively usurping Commerce's clear discretion to interpret or clarify a regulation. Under protest, Commerce issued its Remand Redetermination and revised its results, accepting the withdrawal request and rescinding the review.

This appeal raises issues of agency discretion. The CIT's decision was in error and not in accordance with law.

STATEMENT OF THE FACTS

A. Proceedings before Commerce

Commerce issued an antidumping duty order on glycine from China (the "Order") in 1995. *Antidumping Duty Order: Glycine From the People's Republic of China*, 60 Fed. Reg. 16,116 (Int'l Trade Admin. Mar. 29, 1995). On March 1, 2012, Commerce notified interested parties of the opportunity to request an administrative review of the Order. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 77 Fed. Reg. 12,559, 12,560 (Int'l Trade Admin. Mar. 1, 2012) ("Opportunity to Request Notice") Appx231.

In response to March 30, 2012 requests from Baoding Mantong and GEO, Commerce initiated the administrative review at issue in this action. GEO Request for Administrative Review (Mar. 30, 2012) Appx235-242; Baoding Mantong Request for Administrative Review (Mar. 30, 2012) Appx244-248; *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 77 Fed. Reg. 25,401, 25,403 (Int'l Trade Admin. Apr. 30, 2012) ("Initiation") Appx249-253. GEO requested that Commerce review sales of subject merchandise by Baoding Mantong and twenty-five other producer/exporters. Appx236. On July 9, 2012, Commerce selected Baoding Mantong as one of two mandatory respondents and issued a questionnaire to Baoding Mantong. Respondent Selection Memorandum

(July 9, 2012) Appx294-302; Antidumping Duty Questionnaire (July 18, 2012) Appx303-308.

On July 30, 2012, GEO timely withdrew its administrative request as to all 26 companies, including Baoding Mantong. GEO Withdrawal of Request for Administrative Review (July 30, 2012) Appx309-317. On August 7, 2012, after the 90-day deadline expired for unilateral withdrawal of an administrative review request, Baoding Mantong requested that Commerce, under 19 C.F.R. § 351.213(d)(1), extend the 90-day period and accept Baoding Mantong's withdrawal of its request after the deadline. Baoding Mantong Withdrawal of Administrative Review Request (Aug. 7, 2012) Appx318-324. Baoding Mantong repeatedly referenced 19 C.F.R § 351.213(d)(1), acknowledging "{t}he Secretary may extend {the 90 day time limit} if the Secretary decides that it is reasonable to do so." Appx320.

Baoding Mantong argued that "extraordinary circumstances exist in this case", noting that, because both GEO and Baoding Mantong had requested reviews, a "unilateral withdrawal by only one party would be of no consequence…" Appx320. According to Baoding Mantong, "{g}iven that Baoding Mantong was not aware of GEO's withdrawal of its administrative review request as to Baoding Mantong until service of the withdrawal request was received by counsel for Baoding Mantong via first class mail **after** expiration of the 90 day period, Baoding Mantong had no reason to believe that a unilateral withdrawal of its own administrative review request would have any impact." Appx321. Baoding Mantong further asserted that "good reason exists" because "the review is still in its earliest stages and Commerce has yet to invest significant administrative resources in this proceeding." *Id.*

On September 27, 2012, Commerce notified Baoding Mantong that it had rejected the withdrawal request because Baoding Mantong had not shown an extraordinary circumstance warranting an extension of time. Rejection of Baoding's Withdrawal of its Administrative Review Request (September 27, 2012) Appx675-676. In response, on October 18, 2012, Baoding Mantong notified Commerce that the company would no longer be participating in the administrative review and would not respond to Commerce's questionnaire. Baoding Withdrawal from the Administrative Review (Oct. 18, 2012) Appx677-678.

Commerce published the preliminary results of the review on December 6, 2012, assigning Baoding Mantong a 453.79% antidumping duty margin based on facts otherwise available on the record and an adverse inference under section 776(b) of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1677e, because Baoding Mantong refused to respond to Commerce's questionnaire. *Glycine from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Partial Rescission of Antidumping Duty*

Administrative Review; 2011-2012, 77 Fed. Reg. 72,817 (Int'l Trade Admin. Dec. 6, 2012) ("Preliminary Results") Appx679-687. Commerce explained in the accompanying decision memorandum that, because Baoding Mantong failed to cooperate to the best of its ability, Baoding Mantong was no longer eligible for a rate that is separate from the China-wide rate, a rate assigned to all other exporters of Chinese glycine that have not qualified for a separate rate and are deemed to be part of the single China entity. Issues & Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review & Preliminary Partial Rescission of Antidumping Duty Administrative Review, A-570-836, ARP 11-12, at 5-6 (Nov. 29, 2012) ("Prelim. Decision Mem.") Appx688-696.

After the Preliminary Results were issued on December 6, 2012, G&M entered an appearance before Commerce December 17, 2012, and filed a case brief objecting to: (1) Commerce's rejection of Baoding Mantong's request to withdraw its administrative review request; and (2) the application of a 453.79% dumping margin to Baoding Mantong. Glycine & More's Comments on the Preliminary Results 2-3, 6 (Jan. 7, 2013) Appx697-707.

On April 8, 2013, Commerce published the Final Results, which assigned to Baoding Mantong a dumping margin of 453.79%. Final Results, 78 Fed. Reg. at 20,892. Appx641-643. According to the Issues & Decision Memorandum issued with the Final Results, Commerce obtained this rate from the rate calculated for

Baoding Mantong in the preceding administrative review of the Order. Issues & Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Glycine from the People's Republic of China, A-570-836 (Apr. 1, 2013) Appx657-664.

B. Proceedings before the CIT

G&M initiated an action in the CIT by filing a summons April 26, 2013 and a complaint May 20, 2013. Appx31-33, Appx42-49. G&M filed a Motion for Judgment on the Agency Record January 31, 2014 (Appx129-155), which both GEO and Commerce opposed (Appx162-188, Appx189-220).

On November 11, 2015, the CIT issued its first opinion in *Glycine & More, Inc. v. United States and GEO Specialty Chemicals, Inc.*, Slip Op. 15-124 (Nov. 3, 2015) ("First Opinion"). Appx565-588. It concluded that Commerce's determination, which found Baoding Mantong's late withdrawal request to be unreasonable, was "unlawful". Appx571. The CIT based its opinion on the history of the regulation, determining that Commerce's current interpretation "cannot be sustained". Appx586.

According to the CIT, the regulatory history of 19 C.F.R. § 351.213 is contained in a specific statement. In 1997, Commerce stated:

> We agree that the 90-day limitation may be too rigid. However, we believe that the Department must have the final say concerning rescissions of reviews requested after 90 days in order to prevent abuse of the procedures for requesting and withdrawing a review. For

> example, we are concerned with the situation in which a party requests a review, the Department devotes considerable time and resources to the review, and then the party withdraws its requests once it ascertains that the results of the review are not likely to be in its favor. To discourage this behavior, the Department must have the ability to deny withdrawals of requests for review, even in situations where no party objects.
>
> Therefore, in § 351.213(d)(1), we have retained the 90-day requirement. In addition we have added a new sentence, taken from 19 CFR §§ 353.22(a)(5) and 355.22(a)(3), that essentially provides that if a request for rescission is made after the expiration of the 90-day deadline, the decision to rescind a review will be at the Secretary's discretion.

Antidumping Duties; Countervailing Duties, Final Rule, 62 Fed. Reg. 27,296, 27,296 (Int'l Trade Admin. May 19, 1997) ("Final Rule"). The First Opinion's recitation of this provision omitted the last sentence of the first paragraph. Appx581.

At least partially recognizing that the regulation "imparts the discretion to decide extension requests to the Commerce Secretary," the CIT ordered a remand "to decide anew the question of whether Baoding Mantong's request" should be approved. Appx587. The CIT, however, limited its analysis, stating that Commerce "could sustain a decision reinstating the previous, negative decision only if the record were to support a finding of a new and compelling circumstance, not previously identified by Commerce…" *Id.*

On February 2, 2016, Commerce issued its Redetermination Pursuant to Court Remand Order in *Glycine & More, Inc. v. United States*, Court No. 13-

00167 ("Remand Redetermination"). Appx597-609. Commerce extended the deadline for Baoding Mantong to withdraw the request "under protest" because it could not identify any "new and compelling circumstance" justifying denial. Appx604. Commerce indicated it would then rescind the review for Baoding Mantong. Appx609.

GEO, G&M and Commerce all provided comments on the Remand Redetermination. Appx615-625, Appx665-667, Appx668-671. GEO explained that there were two "new and compelling" circumstances not previously identified by Commerce. GEO's Comments on the Final Results of Redetermination (March 3, 2016) Appx620-621. First, the CIT omitted from its First Opinion a critical sentence from the portion of the 1997 preamble that GEO quoted: "To discourage this behavior, the Department must have the ability to deny withdrawals of requests for review, even in situations where no party objects." *Id.*; Appx648, quoting Final Rule at 27,317. Second, GEO pointed out that Commerce had failed to address GEO's argument that Baoding Mantong had the opportunity to request before the deadline an extension of the right to withdraw under the version of 19 C.F.R. § 351.302 then in effect. GEO Comments on the Final Results of Redetermination (Mar. 3, 2016) Appx621-622; GEO Comments on the Draft Results of the Redetermination (Jan. 6, 2016) Appx650.

G&M and Commerce merely argued that Commerce's Final Remand Results were correct (although Commerce again identified that it was doing so "under protest"). G&M's Comments on Final Remand Results (Mar. 3, 2016) Appx665-667; Commerce's Response to the Parties Remand Comments (Mar. 18, 2016) Appx668-671.

On October 11, 2016, the CIT issued its opinion in *Glycine & More, Inc. v. United States and GEO Specialty Chemicals, Inc.*, Slip Op. 16-96 (Oct. 11, 2016) ("Second Opinion"). Appx1-16. In the Second Opinion, the CIT rejected GEO's arguments. Appx13-16. It adopted a judgment granting G&M's Motion for Judgment on the Agency Record and affirmed the Final Remand Results. *Id.* at Appx1-2.

C. The Rescission Regulation

As discussed previously, a party can only withdraw from an administrative review by direct request. 19 C.F.R. § 351.213(d)(1) states:

> The Secretary will rescind an administrative review under this section, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. The Secretary may extend this time limit if the Secretary decides that it is reasonable to do so.

Commerce has provided several *Federal Register* notices regarding what is "reasonable." On August 1, 2011, it stated:

> Deadline for Withdrawal of Request for Administrative Review
>
> Pursuant to section 351.213(d)(1) of the Department's regulations, a party that has requested a review may withdraw that request within 90 days of the date of publication of the notice of initiation of the requested review. The regulation provides that the Department may extend this time if it is reasonable to do so. In order to provide parties additional certainty with respect to when the Department will exercise its discretion to extend this 90-day deadline, interested parties are advised that, with regard to reviews requested on the basis of anniversary months on or after August 2011, the Department will not consider extending the 90-day deadline unless the requestor demonstrates that an extraordinary circumstance has prevented it from submitting a timely withdrawal request. Determinations by the Department to extend the 90-day deadline will be made on a case-by-case basis.
>
> The Department is providing this notice on its Web site, as well as in its "Opportunity to Request Administrative Review" notices, so that interested parties will be aware of the manner in which the Department intends to exercise its discretion in the future.

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review, 76 Fed. Reg. 45,773, 45,775 (Int'l Trade Admin. Aug. 1, 2011). The same language appeared in a publication March 1, 2012. Opportunity to Request Notice, 77 Fed. Reg. at 12,560; *see* First Opinion at Appx565, Appx571-573.

SUMMARY OF THE ARGUMENT

In its First Opinion, remanding the matter to Commerce for reconsideration, the CIT erred in imposing upon Commerce a standard of review under 19 C.F.R. § 351.213(d)(1) that is contrary to both: (1) the plain language of the regulation; and (2) a court's deference to an agency's promulgation of a rule. Under protest, Commerce completed its Remand Redetermination, and the CIT again erred in approving the results of the Remand Redetermination.

ARGUMENT

A. Standard of Review

When reviewing CIT decisions, this Court reviews *de novo* the proper interpretation of the governing statutes and regulations. *Guess?, Inc. v. United States*, 944 F.2d 855, 857 (Fed. Cir. 1991). If a regulation is clear on its face, no deference is given to the promulgating agency's interpretation, as the regulation is interpreted in accordance with its clear meaning. *Christensen v. Harris County*, 529 U.S. 576, 588, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000).

Where a regulation is ambiguous, however, the promulgating agency's interpretation is given substantial deference "as long as . . . the agency's interpretation is neither plainly erroneous nor inconsistent with the regulation." *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 836 (Fed. Cir. 2006). In this context, "{d}eference to an agency's interpretation of its own regulations is broader than deference to the agency's construction of a statute, because in the latter case the agency is addressing Congress's intentions, while in the former it is addressing its own." *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1363-64 (Fed. Cir. 2005).

In general, "{t}he agency's construction of its own regulations is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Reizenstein v. Shinseki*, 583 F.3d 1331, 1335 (Fed. Cir. 2009) (citing

Cathedral Candle Co. at 400 F.3d 1364) (quoting *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410, 414, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945)); *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997). These principles have been consistent and regular. *Hyatt v. Dudas*, 551 F.3d 1307, 1311 (Fed. Cir. 2008) ("An agency's interpretation of its own regulation is entitled to substantial deference, and the reviewing court should give effect to the agency's interpretation so long as it is reasonable.") (internal citations omitted); *see Bowles*, 325 U.S. at 414 ("… the administrative interpretation . . . becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.").

B. The CIT's Opinions Lacked Sufficient Deference to Commerce's Interpretation of its Regulations, Policies and Practices

Congress has mandated that Commerce is the administering authority for antidumping duty ("AD") and countervailing duty ("CVD") orders (collectively, "orders"), suspension agreements, and the periodic administrative reviews of orders and suspension agreements ("reviews"). In accordance with 19 U.S C. § 1675(a)(1) and 19 C.F.R. § 351.213(b), if, during the anniversary month of an order or suspension agreement (the calendar month in which Commerce published an order or suspension agreement in the *Federal Register*), an interested party requests that Commerce conduct a review of an order or suspension agreement, Commerce will initiate a review.

During the 36 years that Commerce has been the administering authority for orders, suspension agreements and reviews, Commerce has developed regulations, policies and practices to ensure that it meets Congress's mandate in the most timely, efficient and equitable manner. Commerce has established regulations, policies and practices regarding the data and information it requires from interested parties to conduct its reviews, how it will use the data and information in reviews, and the deadlines for which it and interested parties that are participating in reviews are bound.

In the Second Opinion, the CIT: (i) ignored the regulatory scheme that Commerce established to address a request by an interested party for an extension of a deadline in AD and CVD proceedings; (ii) placed inappropriate restrictions on what Commerce could determine in the CIT-ordered remand; and (iii) failed to accord sufficient deference to Commerce's regulations, policies and practices regarding what an interested party must do when it requests that Commerce permit the interested party to withdraw a request for a review.

1. Commerce has established a regulatory scheme addressing how a withdrawal of a request for review must occur and how extensions for these requests must be obtained

Commerce conducts a review if an interested party requests that Commerce do so. 19 U.S.C. §1675(a)(1) and 19 C.F.R. §351.213(b). Commerce automatically rescinds reviews if interested parties that requested a review withdraw their requests for review within 90 days of initiation of the review. 19 C.F.R. §351.213(d)(1). Moreover, Commerce may extend the 90-day period to withdraw a request for a review "if {Commerce} decides that it is reasonable to do so." *Id*.

In keeping with the "reasonableness" standard, Commerce has explained multiple times that it has the authority to extend these periods. Commerce explained its authority to extend its deadlines in AD and CVD proceedings when it drafted regulations to implement the Uruguay Round Agreements Act:[1]

> Parties should not draw the inference that simply because a particular deadline does not explicitly address the Department's authority to extend such deadline that the Department may not do so.

Antidumping Duties; Countervailing Duties, Notice of Proposed Rulemaking and Request for Public Comments, 61 Fed. Reg. 7,308, 7,325 (Int'l Trade Admin. Feb. 27, 1996).

> Whether or not a regulation includes the qualifier 'normally,' the Department retains the authority to extend any time limit established in these regulations unless precluded by statute (§ 351.302(b)).

Final Rule at 27,332.

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[1] The Uruguay Round Agreements Act amended the AD and CVD provisions of the Tariff Act to conform those provisions to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and the Agreement on Subsidies and Countervailing Measures, both of which are part of the Marrakesh Agreement establishing the World Trade Organization. Uruguay Round Agreements Act, 19 U.S.C. § 3511-3556 (Pub. L. No. 103, 108 Stat. 4809 (1994)).

Commerce made it clear in its Final Rule that 19 C.F.R. §351.302(b) pertained to all time limits in Part 351. In addressing a commenter's suggestion that the Department give itself the authority to extend the deadline for proposing a suspension agreement, Commerce responded:

> We agree with this suggestion, but note that it already is addressed by § 351.302(b), which provides the Secretary with authority to extend, for good cause, any time limit established by Part 351.

Id. at 27,312.

In addressing a comment regarding submitting additional factual information when preliminary or final determinations of reviews are extended, Commerce replied:

> although the regulations do not provide for automatic extension of the deadline for submission of factual information in reviews whenever the deadline for the preliminary or final determinations is extended, the Department may extend any time limit, including deadlines for submission of factual information, for good cause (§ 351.302).

Id. at 27,332.

Finally, in explaining the Annexes to Part 351, Commerce specified that:

> As stated previously, under § 351.302(b), the Secretary may, for good cause, extend any time limit established by Part 351 unless such an extension is expressly precluded by statute.

Id. at 27,378.

Commerce will, therefore, grant a timely request for an extension of a deadline identified in Part 351 if it determines that there is "good cause" to do so. 19 C.F.R. § 351.302(b).

Conversely, once the relevant deadline has passed, Commerce treats the standard for an extension differently. Since August 2011, Commerce has provided frequent and fair warning to interested parties that it will only consider untimely requests for withdrawal of requests for review if an "extraordinary circumstance" prevented an interested party from filing a timely extension request. For example:

> In order to provide parties additional certainty with respect to when the Department will exercise its discretion to extend this 90-day deadline, interested parties are advised, that, with regard to reviews requested on or after August 2011, *the Department does not intend to extend the 90-day deadline unless the requestor demonstrates that an extraordinary circumstance has prevented it from submitting a timely withdrawal request.*

Initiation, 77 Fed. Reg. at 25,401 (emphasis added); *see* Opportunity to Request Notice, 77 Fed Reg. at 12,560 . Both notices pertained to the 2011-2012 glycine from China administrative review.

In its comments on Commerce's draft Results of the Redetermination, GEO argued that the relationship between 19 C.F.R. §§ 351.213 and 351.302 was a "new and compelling circumstance." GEO's Comments on the Draft Results of the Redetermination (Jan. 6, 2016) Appx645, Appx648-650. Commerce dismissed GEO's comment by reasoning that using 19 C.F.R. § 351.302 to timely request an extension of the deadline for withdrawing a review request was not "new and compelling" because "the main issue in this review, which was considered by the Department in the Issues and Decision Memorandum, is that Baoding Mantong did not seek a timely extension of the 90-day deadline." Remand Redetermination. Appx 597, Appx608-609.

2. The CIT opinions vitiated Commerce's ability to interpret or clarify its own regulations

The CIT placed inappropriate restrictions on how Commerce could conduct the CIT-ordered remand. Commerce completed its Remand Redetermination, under protest, and the CIT approved the Remand Redetermination. For example, despite Commerce's frequent and consistent notice that it would not consider untimely requests for withdrawal of requests for reviews absent an extraordinary circumstance:

> {T}he CIT instructed the Department to reach a new decision that does not require that Baoding Mantong demonstrate that extraordinary circumstances prevented it from filing a timely withdrawal of review request.

Id. at Appx603.

The CIT's instruction to Commerce was actually more restrictive:

> On remand, Commerce must reach a new decision that does not apply the interpretation of § 351.213(d)(1) Commerce adopted in 2011, which is unreasonable for the reasons the Court has identified, and instead applies an interpretation that *is* reasonable and in particular, is consistent with the purpose of the regulation, as stated by Commerce upon promulgation in 1989 and maintained upon re-promulgation in 1997.

First Opinion at Appx565, Appx586-587.

The CIT continued:

> Under the circumstances shown by the record of this proceeding, it appears likely that only a decision allowing a nine-day extension, and a consequent rescission of the relevant review, could fulfill the stated purpose of § 351.213(d)(1). For although this regulation grants the Secretary of Commerce discretion over whether to extend the 90-day period, the compelling circumstances giving rise to this case, when viewed according to the purpose of the regulation, would call into question any decision on remand reinstating the previous, challenged decision to deny the extension.
>
> The court envisions that it could sustain a decision reinstating the previous, negative decision only if the record were to support a finding of a new and compelling circumstance, not previously identified by Commerce in the Issues & Decision Memorandum or elsewhere during the review, that, despite the circumstances the court has identified, could justify disallowing Baoding's withdrawal. At this time, the court is not aware of any such circumstance.

Id. at Appx587-588.

This is not a court remanding a decision to an agency for a further explanation regarding why the agency reasonably reached a certain result but a court directing an outcome from an agency on how the agency should interpret its own regulations. Hamstringing Commerce during a remand so that it cannot explain, for the Court's examination and determination, its regulations, policies and practices– and instead directing a result – usurps the authority and discretion that agencies enjoy when constructing and interpreting their regulations. This is not the CIT's role.

GEO identified and laid out the scheme contained in Commerce's regulations regarding deadlines, extensions of deadlines and Commerce's criterion for accepting or rejecting untimely requests for withdrawing requests for reviews. GEO argued that – for Part 351, in general, and 19 C.F.R. § 351.213(d)(1), in particular -- a deadline extension request *before the deadline* must identify for Commerce's consideration good cause per 19 C.F.R. § 351.302(b) and a deadline extension request *after the deadline* must identify for Commerce's consideration an extraordinary circumstance preventing a timely extension request for a review request withdrawal per Commerce's notice regarding 19 C.F.R. § 351.213(d)(1). Commerce rejected this argument under duress from the First Opinion.

3. The CIT opinions are contrary to the agency's defined role

Congress has given Commerce a difficult task. Administering hundreds of investigations, orders, suspension agreements and reviews in a timely, efficient and equitable manner is no mean task. Commerce promulgates, defines and clarifies its regulations to enforce the applicable statutes and provide interested parties participating in its proceedings a roadmap to successful participation in the process. The courts have recognized the difficulties that agencies face in administering their mandates and have provided significant deference to how agencies accomplish what obligations Congress has placed upon them. For example:

> Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules or procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.

Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 543-544, 98 S. Ct. 1,197, 1,211, 55 L. Ed. 2d 460, 479-480 (1978).

> Accordingly, absent such constraints or circumstances, courts will defer to the judgment of an agency regarding the development of the agency record. To do otherwise would run{} the risk of propel{ling} the court{s} into the domain which Congress has set aside for the administrative agencies.

FPC v. Transcon. Gas Pipe Line Corp., 423 U.S. 326, 333, 96 S. Ct. 579, 583, 46 L. Ed. 2d 533, 540 (1976)

This Court has spoken regarding the roles each branch plays in addressing whether an agency is properly administering Congress's mandate:

> In our view, the Trade Court improperly intruded upon Commerce's power to apply its own procedures for the timely resolution of antidumping reviews. The role of judicial review is limited to determining whether the record is adequate to support the administrative action. A court cannot set aside application of a proper administrative procedure because it believes that properly excluded evidence would yield a more accurate result if the evidence were considered.

PSC VSMPO-Avisma Corp. v. United States, 688 F. 3d 751, 761 (Fed. Cir. 2012).

Any reasonable construction of the statute is a permissible construction. "{A}n agency's construction need not be the only reasonable interpretation or even the most reasonable interpretation. Rather, a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another." *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (citing *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978)). The court will defer to the agency's construction of the statute as a permissible construction if it "reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' express intent." *Rust v. Sullivan*, 500 U.S. 173, 184 (1991); *see also Torrington Co. v. United States*, 82 F.3d 1039, 1044 (Fed. Cir. 1996).

The CIT's analysis simply short-circuits this entire process. Commerce properly reserved to itself significant discretion in considering an untimely request to withdraw an administrative review. The CIT rewrote the regulation.

CONCLUSION AND RELIEF SOUGHT

Commerce performed its role reasonably in the 2011-2012 administrative review. Baoding Mantong did not request in a timely manner an extension of the deadline for withdrawing its request for a review. Baoding Mantong ignored Commerce's frequent and consistent warnings that Commerce would not consider untimely requests for withdrawal of requests for review absent an extraordinary circumstance, and Baoding Mantong failed to support its claim that an extraordinary circumstance existed. Commerce provided notice of how it would implement its regulations, Baoding Mantong ignored that notice, and Commerce proceeded accordingly in a reasonable manner.

For these reasons, GEO requests that this Court provide the deference due Commerce in this proceeding and determine that Commerce acted in accordance with the applicable statute and its regulations. The CIT's Second Opinion and Order should be reversed with instructions to reinstate Commerce's original determination of April 8, 2013.

Respectfully submitted,

February 6, 2017

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ADDENDUM

UNITED STATES COURT OF INTERNATIONAL TRADE

GLYCINE & MORE, INC., Plaintiff, v. **UNITED STATES,** Defendant, and **GEO SPECIALTY CHEMICALS, INC.,** Defendant-Intervenor.	**Before: Timothy C. Stanceu, Chief Judge** **Court No. 13-00167**

JUDGMENT

Upon consideration of the final determination ("Final Results") issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), *Glycine from the People's Republic of China: Final Results of Antidumping Duty Admin. Review; 2011-2012*, 78 Fed. Reg. 20,891 (Int'l Trade Admin. Apr. 8, 2013) ("*Final Results*"), the Department's determination on remand ("Remand Redetermination"), *Final Results of Redetermination Pursuant to Court Remand* (Feb. 2, 2016), ECF No. 50-1, and all filings and proceedings had herein, upon due deliberation, and in conformity with the court's opinions in this proceeding, it is hereby

ORDERED that plaintiff's 56.2 Motion for Judgment on the Agency Record, (Jan. 31, 2014), ECF No. 28, be, and hereby is, granted; it is further

ORDERED that the Department's decision in the Remand Redetermination to extend the deadline for withdrawing a request for an administrative review pursuant to 19 C.F.R. § 351.213(d)(1), accept the withdrawal request submitted by Baoding Mantong Fine Chemistry Co., Ltd. ("Baoding"), and rescind the review with respect to Baoding be, and hereby is, affirmed; it is further

ORDERED that the Department shall take the necessary steps required by law to complete the rescission of the review with respect to Baoding; and it is further

ORDERED that the entries affected by this litigation shall be liquidated in accordance with the final court decision in this action.

/s/ Timothy C. Stanceu
Timothy C. Stanceu
Chief Judge

Dated: October 11, 2016
New York, New York

Slip Op. 16-96

UNITED STATES COURT OF INTERNATIONAL TRADE

GLYCINE & MORE, INC., Plaintiff, v. **UNITED STATES,** Defendant, and **GEO SPECIALTY CHEMICALS, INC.,** Defendant-Intervenor.	**Before: Timothy C. Stanceu, Chief Judge** **Court No. 13-00167**

OPINION

[Affirming a decision of the International Trade Administration, U.S. Department of Commerce, issued in response to court order, on the withdrawal of a request for a periodic review of an antidumping duty order]

Date: Ocotber 11, 2016

Ronald M. Wisla, Kutak Rock LLP, of Washington D.C., argued for plaintiff Glycine & More, Inc. With him on the brief was *Lizbeth R. Levinson*.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., argued for defendant United States. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy,* Assistant Director. Of counsel on the brief was *Jessica M. Link*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

David Michael Schwartz, Thompson Hine LLP, of Washington D.C., argued for defendant-intervenor GEO Specialty Chemicals, Inc.

Stanceu, Chief Judge: In this litigation, plaintiff Glycine & More, Inc. ("Glycine & More") contested the final determination ("Final Results") issued by the International Trade Administration of the U.S. Department of Commerce ("Commerce" or the "Department") to conclude an administrative review of an antidumping duty order (the "Order") on glycine from the People's Republic of China ("PRC" or "China"). Glycine & More, a U.S. importer, imported glycine produced and exported by its Chinese affiliate, Baoding Mantong Fine Chemistry Co., Ltd. ("Baoding"), the sole respondent in the review. Glycine & More contested the Final Results on the ground that Commerce unlawfully refused to allow Baoding to withdraw its request that the review be conducted.

Before the court is the decision ("Remand Redetermination") Commerce issued in response to the court's opinion and order in *Glycine & More, Inc. v. United States*, 39 CIT __, 107 F. Supp. 3d 1356 (2015) ("*Glycine & More*"). The Remand Redetermination announces the Department's intention, expressed under protest, to accept Baoding's withdrawal request and rescind the review with respect to Baoding. *Final Results of Redetermination Pursuant to Court Remand* (Feb. 2, 2016), ECF No. 50-1 ("*Remand Redetermination*"). The court affirms the decision reached in the Remand Redetermination.

I. BACKGROUND

The court's prior opinion presents background information on this case, which is summarized briefly and supplemented herein with developments since the issuance of that opinion. *See Glycine & More*, 39 CIT at __, 107 F. Supp. 3d at 1358-60.

A. Administrative Proceedings

On March 30, 2012, Baoding and defendant-intervenor GEO Specialty Chemicals ("GEO") filed requests for an administrative review of the Order. *GEO Request for Admin. Review* (Admin.R.Doc. No. 1); *Baoding Mantong Request for Admin. Review* (Admin.R.Doc. No. 2). GEO requested that Commerce review sales of subject merchandise by Baoding and twenty-five other producer/exporters. *GEO Request for Admin. Review* 2. On April 30, 2012, Commerce initiated a review, covering a period of review ("POR") of March 1, 2011 to February 29, 2012, and on July 10, 2012 selected Baoding as one of two mandatory respondents. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 77 Fed. Reg. 25,401, 25,403 (Int'l Trade Admin. Apr. 30, 2012) ("*Initiation*"); *Respondent Selection Mem.* (July 9, 2012) (Admin.R.Doc. No. 18). On July 30, 2012, GEO withdrew its administrative review request as to all twenty-six companies, including Baoding, *Pet'r's Withdrawal of Request for Admin. Review* (Admin.R.Doc. No. 37), leaving Baoding's request as the only outstanding request that the review be conducted.

On August 7, 2012, Baoding sought to withdraw its request for the review. *Baoding's Withdrawal of Admin. Review Request* (Admin.R.Doc. No. 39) ("*Baoding's Withdrawal Request*"). Under the Department's regulation, Commerce rescinds an administrative review if all requestors withdraw their requests within 90 days of initiation. 19 C.F.R. § 351.213(d)(1). The regulation provides that "[t]he Secretary may extend this time limit if the Secretary decides that it is reasonable to do so." *Id.* Because a withdrawal of a review request would not be given automatic effect unless made by July 30, 2012, Baoding requested that the Secretary extend the 90-day period.[1] *Baoding's Withdrawal Request* 2-3. On September 27, 2012, Commerce rejected Baoding's withdrawal request on the ground that Baoding had not demonstrated an extraordinary circumstance warranting an extension of the 90-day period. *Rejection of Baoding's Withdrawal of its Admin. Review Request* 1 (Admin.R.Doc. No. 47) ("*Rejection of Baoding's Withdrawal Request*").

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[1] The court's previous opinion and order incorrectly stated this date as July 29, 2012. *See Final Results of Redetermination Pursuant to Court Remand* 6 n.20 (Feb. 2, 2016), ECF No. 50-1. As a result, the extension Baoding had sought was an eight-day, not a nine-day, extension as stated in the court's prior opinion and order.

In the Preliminary Results, Commerce determined that Baoding had failed to cooperate to the best of its ability by not responding to the Department's questionnaire and, on the basis of facts available and an adverse inference, determined that Baoding did not qualify for separate rate status. *See Glycine from the People's Republic of China, Prelim. Results of Antidumping Duty Admin. Review and Prelim. Partial Rescission of Antidumping Duty Admin. Review; 2011-2012*, 77 Fed. Reg. 72,817, 72,817 (Int'l Trade Admin. Dec. 6, 2012) ("*Prelim. Results*"). As a result, Commerce assigned Baoding a margin of 453.79%, which was the "PRC-wide" rate Commerce assigned to parties failing to demonstrate independence from the government of China. *Id.* In the Final Results, Commerce made no changes to the preliminary results, again assigning Baoding a margin of 453.79%. *See Glycine from the People's Republic of China: Final Results of Antidumping Duty Admin. Review; 2011-2012*, 78 Fed. Reg. 20,891, 20,892 (Int'l Trade Admin. Apr. 8, 2013) ("*Final Results*").

B. Proceedings Before the Court

Glycine & More initiated this action by filing a summons, (Apr. 26, 2013), ECF No. 1, and a complaint, (May 20, 2013), ECF No. 6. The court held oral argument on September 9, 2014. ECF No. 43. The court issued its previous opinion and order on November 3, 2015. *Glycine & More*, Slip Op. No. 15-124. In response, Commerce issued the Remand Redetermination on February 2, 2016. *Remand Redetermination.* Commerce announced, under protest, that it intended "to extend the deadline for withdrawing a request for an administrative review pursuant to 19 CFR 351.213(d)(1), accept Baoding Mantong's untimely withdrawal request, and rescind the review with respect to Baoding Mantong." *Id.* at 1.

Glycine & More and defendant-intervenor GEO submitted comments on the Remand Redetermination on March 3, 2016. Def.-Intervenor's Comments on the Final Results of

Redeterm. Pursuant to Court Remand, ECF No. 52 ("GEO's Comments"); Pl.'s Comments on Final Remand Results, ECF No. 54 ("Glycine & More's Comments"). Defendant filed a response to the comments on March 18, 2016. Def.'s Resp. to the Parties' Remand Comments (March 18, 2016), ECF No. 55 ("Def.'s Resp."). Glycine & More supports the Remand Redetermination; GEO opposes it.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 (the "Tariff Act"), as amended, 19 U.S.C. § 1516a, including an action contesting a final determination concluding an antidumping administrative review.[2] In doing so, the court "shall hold unlawful any determination, finding, or conclusion found . . . , to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

B. The Court's Previous Opinion and Order

In *Glycine & More*, the court held unreasonable the interpretation of the regulation, 19 C.F.R. § 351.213(d)(1), upon which Commerce rejected Baoding's attempted withdrawal of its review request. *Glycine & More*, 39 CIT at __, 107 F. Supp. 3d at 1364-67. The court noted that the regulation contains two provisions, one of which gives effect to a party's withdrawal of a request for an administrative review if the withdrawal occurs within a period of 90 days from the date of initiation of the review. *Id.*, 39 CIT at __, 107 F. Supp. 3d at 1364 (citing 19 C.F.R.

[2] All citations to the United States Code herein are to the 2012 edition and all citations to the Code of Federal Regulations are to the 2013 edition except where otherwise indicated.

§ 351.213(d)(1)). The second provision, the court noted, "provides that '[t]he Secretary may extend this time limit if the Secretary decides that it is reasonable to do so.'" *Id.* (citing 19 C.F.R. § 351.213(d)(1))[3].

Under the interpretation of § 351.213(d)(1) that Commerce applied in this case, and as first stated by Commerce in August 2011, Commerce will not extend the 90-day period provided in § 351.213(d)(1) "unless the requestor demonstrates that an extraordinary circumstance has prevented it from submitting a timely withdrawal request." *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 76 Fed. Reg. 45,773, 45,773 (Int'l Trade Admin Aug. 1, 2011). Tracing the history of the regulation, the court concluded that the "extraordinary circumstance" interpretation, as applied in this case, defeated the very purpose for which Commerce included the second provision. *Glycine & More*, 39 CIT at __, 107 F. Supp. 3d at 1367. That purpose, the court concluded, was to allow a party to know the results of the immediately preceding review before making a decision on whether to withdraw a review request. *Id.*, 39 CIT at __, 107 F. Supp. 3d at 1365 (citing *Antidumping Duties* (Final rule), 54 Fed. Reg. 12,742, 12,755 (Int'l Trade Admin. Mar. 28, 1989)). As the court stated, "[t]he Department's interpretation of § 351.213(d)(1) left no means for Baoding to obtain, or even request, an extension of the 90-day period that would have allowed it to know the final results of the immediately preceding review before making the decision to withdraw, despite the purpose for the provision that the Department stated upon promulgation." *Id.*, 39 CIT at __, 107 F. Supp. 3d at 1368. The court observed that the final results of the immediately preceding, i.e., fifth, administrative review had not been issued as of the closing of the 90-day period and instead were not published until October 18, 2012. *Id.*, 39 CIT at __, 107 F. Supp. 3d at 1368 & n.8. The court stated, further, that "Glycine & More's statements to Commerce during the administrative proceedings indicate that Baoding considered the developments in the preceding review significant to its decision whether to withdraw its request for the review at issue." *Id.*, 39 CIT at __, 107 F. Supp. 3d at 1368 (citing *Glycine & More's Comments on the Prelim. Results* 3-4 (Jan. 7, 2013) (Admin.R.Doc. No. 54)).

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[3] Section 351.213(d)(1) reads as follows: "The Secretary will rescind an administrative review under this section, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. The Secretary may extend this time limit if the Secretary decides that it is reasonable to do so." 19 C.F.R. § 351.213(d)(1).

In *Glycine & More*, the court ordered Commerce to "decide anew the question of whether Baoding's request for a nine-day extension should be approved." *Id.*, 39 CIT at __, 107 F. Supp. 3d at 1370. The court instructed that Commerce, in doing so, is to

> consider the controlling circumstances, as shown by the record in this case, that: (1) Baoding's withdrawal of its review request occurred only *nine days* after the close of the 90-day period;[4] (2) the review then was at an early stage, with no questionnaires having been submitted; (3) Baoding could not have known the results of the immediately preceding review during the 90-day period, which Commerce had yet to issue as of the expiration of that period; and (4) at the time Baoding submitted the withdrawal of its review request, all parties who had requested a review had expressed the position that the review not be conducted.

Id. The court added that it "envisions that it could sustain a decision reinstating the previous, negative decision only if the record were to support a finding of a new and compelling circumstance, not previously identified by Commerce . . . , that, despite the circumstances the court has identified, could justify disallowing Baoding's withdrawal." *Id.*

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[4] As the court explained previously, *see* n.1, *supra*, the extension Baoding had sought was an eight-day, not a nine-day, extension as stated in *Glycine & More*.

C. The Department's New Decision to Extend the 90-Day Period and Rescind the Review With Respect to Baoding

In the Remand Redetermination, Commerce stated that "because we have not identified any 'new and compelling circumstance,' . . . we intend to extend the deadline set forth in 19 C.F.R. § 351.213(d)(1), accept Baoding Mantong's otherwise untimely withdrawal of review request, and rescind the review with respect to Baoding Mantong." *Remand Redetermination* 6. Commerce stated that it would take these actions "under protest" and that it respectfully disagreed "with the Court's holding." *Id.* Below, the court explains why it will affirm the Department's decision to accept the withdrawal of review request and rescind the review with respect to Baoding. The court explains, further, that in doing so it does not affirm all of the Department's statements in the Remand Redetermination, some of which misinterpret the holding in *Glycine & More*.

D. Affirmance of the Department's Decision to Extend the Due Date and Rescind the Review With Respect to Baoding

The controlling circumstances shown by the record in this case, as outlined by the court in *Glycine & More*, 39 CIT at __, 107 F. Supp. 3d at 1364-70, support a decision to accept Baoding's withdrawal request and rescind the review with respect to Baoding. That the results of the immediately preceding review were not yet published as of the close of the 90-day period is important among those circumstances, for it is precisely the factual situation the Department contemplated upon originally promulgating the provision allowing extensions of the 90-day period. Also, Baoding's request was made sufficiently early that Commerce could not yet have devoted significant resources to the review. There is no record evidence that Commerce had done so, and Commerce did not rely on an expenditure of resources in its initial denial of Baoding's request. To the contrary, Commerce proceeded to expend its valuable resources, unnecessarily, by conducting a review of Baoding even though the parties at interest had expressed the intent that the review not be conducted.

Further, Commerce concluded in the Remand Redetermination that the record did not present a "new and compelling circumstance" supporting the rejection of Baoding's request. As a result, the sole factor weighing against acceptance of the request was the Department's earlier conclusion that Baoding failed to demonstrate that an extraordinary circumstance prevented it from submitting a withdrawal request within the 90-day period. That factor, according to the reasoning in *Glycine & More*, was at odds with the purpose Commerce identified when it promulgated the provision allowing the 90-day period to be extended. The decision reached in the Remand Redetermination to accept the request and rescind the review with respect to Baoding is, therefore, supported by substantial record evidence.

Below, the court explains why it does not agree with every statement Commerce made in the Remand Redetermination. However, because the decision Commerce reached, albeit under protest, is supported by substantial evidence on the administrative record, is adequately explained, and is otherwise in accordance with law, the court will affirm the Department's decision to accept the withdrawal request and, accordingly, rescind the review with respect to Baoding.

E. The Department's Interpretation of the Holding in *Glycine & More*

In the Remand Redetermination, Commerce construed *Glycine & More* to hold that 19 U.S.C. § 351.213(d)(1) must be interpreted to require Commerce to extend the time limit whenever the immediately preceding review is ongoing. *Remand Redetermination* 7. Commerce stated that it disagreed with such a conclusion because "an interpretation of this provision which requires the Department to extend the time limit when the immediately preceding review is ongoing would, in our view, effectively nullify the Department's 'wide discretion.'" *Id.* (citing *Glycine & More*, 39 CIT at __, 107 F. Supp. 3d at 1364). Commerce stated, further, that:

> [W]e disagree with the Court that the purpose of the regulation was to allow a party to know the final results of the immediately preceding review before having to decide whether to withdraw a review request. Rather, we find that the purpose of the regulation was, and continues to be, to ensure the Department would be able to maintain maximum discretion in determining whether to extend the 90-day deadline.

Remand Redetermination 8.

Glycine & More did not hold that Commerce lacked any discretion under § 351.213(d)(1) to deny a request when the results of the immediately prior review are not yet known. Commerce, therefore, interprets the holding of *Glycine & More* too broadly. The court's holding does not "nullify" the Department's discretion. For example, a situation could exist in which a respondent requests an extension of the 90-day period after Commerce has expended considerable time and resources in the current review and the respondent seeks to withdraw its review request after concluding that the results are not likely to be in its favor. In the preamble to its 1997 amendments to its regulations, a portion of which the court quoted in *Glycine & More*, 39 CIT at __, 107 F. Supp. 3d at 1366, Commerce recognized this situation as an example of abuse of the procedures for requesting and withdrawing a review. *See id.* (quoting *Antidumping Duties; Countervailing Duties* (Final rule), 62 Fed. Reg. 27,296, 27,393 (Int'l Trade Admin. May 19, 1997)). In that preamble, Commerce stated that to prevent such abuse, "the Department must have the final say concerning rescissions of reviews requested after 90 days . . . ." *Id.*

The situation Commerce identified in the preamble to the 1997 amendments as an abuse of the procedures for requesting and withdrawing reviews could occur even though the final results of the immediately prior review are not yet known to the respondent. Such a respondent, having participated in both reviews, could have reason to conclude that the results of the current review are likely to be less favorable to it than the pending final results of the preceding one. Such a scenario differs from situation presented in this case, in which there is no indication, and no finding by Commerce, that Baoding abused the procedures for requesting and withdrawing a review. In *Glycine & More*, the court analyzed the regulatory history of the second sentence of 19 U.S.C. § 351.213(d)(1) to observe, in *dicta*, that "it is difficult to see why granting at least a brief extension due to the second sentence would *not* presumptively be reasonable where the preceding review is still ongoing at the close of that period." *Id.* As shown by the court's use of the word "presumptively," the court did not foreclose the possibility that abuse of the procedures in some cases could render an extension unwarranted even if the final results of the preceding review were still pending. Rather than view the pending status of the immediately prior review as a single fact that controlled the outcome of this case, the court remanded the Final Results for reconsideration based on all of the relevant circumstances.

E. The Court Does Not Find Merit in GEO's Objections to the Remand Redetermination

GEO challenges the Department's determination on remand. Specifically, GEO argues that the Remand Redetermination is contrary to this court's opinion and order in *Glycine & More*, in which the court stated that:

> "it could sustain a decision reinstating the previous, negative decision only if the record were to support a finding of a new and compelling circumstance, not previously identified by Commerce in the Issues & Decision Memorandum or otherwise during the review that, despite the circumstances the court has identified, could justify disallowing Baoding's withdrawal."

GEO's Comments 1-2 (quoting *Glycine & More*, 39 CIT at __, 107 F. Supp. 3d at 1370). GEO identifies what it believes are two such "new and compelling" circumstances on the record that had not been previously addressed by Commerce. *See* GEO's Comments 2. GEO submits that each of the circumstances it identifies requires the court to remand the matter to Commerce a second time. *Id.* at 2-3. The court disagrees.

First, GEO argues that "[t]he Court omitted in its opinion a critical portion of the 1997 preamble of the revised regulation that, if included, would significantly undermine the Court's position that the 1989 preamble still provides the regulation's stated purpose . . . ." *Id.* at 3. GEO cites the language from the 1997 preamble quoted by the court and identifies one sentence omitted from the court's quotation as an alleged "new and compelling" circumstance meriting reconsideration by Commerce. The portion of the 1997 preamble quoted by the court in its opinion and order in *Glycine and More*, with highlighting showing the sentence the court omitted from its quotation, is as follows:

> We agree that the 90-day limitation may be too rigid. However, we believe that the Department must have the final say concerning rescissions of reviews requested after 90 days in order to prevent abuse of the procedures for requesting and withdrawing a review. For example, we are concerned with the situation in which a party requests a review, the Department devotes considerable time and resources to the review, and then the party withdraws its requests once it ascertains that the results of the review are not likely to be in its favor. *To discourage this behavior, the Department must have the ability to deny withdrawals of requests for review, even in situations where no party objects*.
>
> Therefore, in § 351.213(d)(1), we have retained the 90-day requirement. In addition, we have added a new sentence, taken from 19 CFR §§ 353.22(a)(5) and 355.22(a)(3), that essentially provides that if a request for rescission is made after the expiration of the 90-day deadline, the decision to rescind a review will be at the Secretary's discretion.

Antidumping Duties; Countervailing Duties (Final rule), 62 Fed. Reg. 27,296, 27,317 (Int'l Trade Admin. May 19, 1997).

The court does not find merit in GEO's first argument. GEO is not correct in arguing that the sentence the court omitted from the quotation in the *Glycine & More* opinion "would significantly undermine the Court's position that the 1989 preamble still provides the regulation's stated purpose . . . ," GEO's Comments 3. The purpose of allowing extensions, as first enunciated by the Department in 1989, was to address "the problem in which a party is faced with the need to decide whether it wants a review before knowing the final results of the immediately preceding review." *Glycine & More*, 39 CIT at __, 107 F. Supp. 3d at 1366. As the court discussed previously in this Opinion, the purpose Commerce originally identified for the second sentence in the regulation, i.e., to allow a party to know the results of the immediately preceding review before making its decision as to withdrawal, is not inconsistent with the Department's stated objective of discouraging abuse of its procedures for requesting and withdrawing reviews. The omitted sentence, whether read alone or in context, does not state or imply to the contrary. Nor does the 1997 preamble indicate that Commerce was changing its intended purpose in continuing to allow a party to obtain an extension of the 90-day period.

GEO grounds its second argument for a "new and compelling circumstance" in the court's discussion in *Glycine & More* of the two choices facing a party seeking to withdraw a review request: "[i]t either must withdraw its request for a review outright within the 90-day period, regardless of whether the results are known, or it must forego any realistic opportunity to do so." GEO's Comments 4 (citing *Glycine & More*, 39 CIT at __, 107 F. Supp. 3d at 1367). According to GEO, there is a third option "whereby a party could request in a timely manner an extension of the withdrawal deadline *before* the 90-day withdrawal deadline and that request could be for an extension of that deadline until the final results of the prior review are ascertained." *Id.* GEO argues that the availability of this "third option" is a "new and compelling" circumstance that Commerce failed to address and now should be required to address. *Id.* at 5-6.

The "third option" GEO describes is not available to a party in Baoding's position. Under the interpretation of § 351.213(d)(1) that Commerce adopted in 2011, and expressly applied in the review at issue, Commerce as a general matter accepts withdrawal requests only if filed within the 90-day period, regardless of whether the results of the immediately preceding review have been issued. The only exception Commerce will allow is where a requestor demonstrates that an extraordinary circumstance *prevented* it from filing its withdrawal request within the 90-day period. *See id.*, 39 CIT at __, 107 F. Supp. 3d at 1363. Lack of knowledge of the final results of the immediately preceding review could not reasonably be described as a "circumstance," let alone an "extraordinary" one, that could *prevent* a withdrawal request from being filed within the 90-day period. Therefore, the 2011 policy announcement, which Commerce referenced when announcing the opportunity to request the subject review and reiterated upon initiating this review, precludes the third option upon which GEO relies for its position.

III. CONCLUSION

For the reasons discussed above, the court concludes that substantial evidence on the record supports the Department's intention to extend the 90-day period set forth in 19 C.F.R. § 351.213(d)(1), to thereby accept Baoding's withdrawal request, and to rescind the review with respect to Baoding. Judgment will enter accordingly.

/s/ Timothy C. Stanceu
Timothy C. Stanceu
Chief Judge

Dated: October 11, 2016
New York, New York

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
Glycine & More, Inc. v. US, 2017-1312

CERTIFICATE OF SERVICE

I, Elissa Diaz, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by Thompson Hine LLP, counsel for Appellant to print this document. I am an employee of Counsel Press.

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